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LUFTY *v.* COMMONWEALTH.

Sept. 17, 1919.

[100 S. E. 829.]

**1. Indictment and Information (§ 110 (6)\*)—For Attempted Rape; Following Statutory Language.**—An indictment, alleging that defendant with force and arms upon a female child under the age of 15 feloniously did make an assault, and did feloniously attempt to carnally know and abuse, is sufficient to charge the offense of attempt to rape; conforming substantially and almost literally with Code 1904, § 3680, denouncing the crime of rape, and section 3888, prescribing the punishment for attempted crimes.

[Ed. Note.—For other cases, see 2 Va.-W. Va. Enc. Dig. 141; 7 Va.-W. Va. Enc. Dig. 413; 11 Va.-W. Va. Enc. Dig. 631.]

**2. Criminal Law (§ 594 (1)\*)—Continuance; Absence of Witness.**—In prosecution for an attempt to rape, where defendant, in accordance with Code 1904, § 4016, was tried at the term at which the indictment was found, the denial of a continuance because of the absence of a witness who was too unwell to appear, and who it was stated was familiar with defendant's high character and knew the character of prosecutrix and her mother, held not error; it appearing that the witness' testimony would be only cumulative as to defendant's high character and standing, and it not appearing that the witness, if permitted, would testify that the character of the prosecutrix and her mother was bad.

[Ed. Note.—For other cases, see 3 Va.-W. Va. Enc. Dig. 281, 288.]

**3. Criminal Law (§§ 765, 834 (5)\*)—Good Character—Instructions.**—The refusal of requested instruction that the character of the accused when proven is a fact to be considered, and if the jury have any doubt as to the guilt of accused, evidence of his good character should "resolve" that doubt in his favor, was proper; the court correctly substituting an instruction charging that the character of accused is a fact to be considered, and if the jury have any reasonable doubt as to guilt they should acquit, the requested instruction practically taking the case from the jury, by use of the word "resolve."

[Ed. Note.—For other cases, see 4 Va.-W. Va. Enc. Dig. 93.]

**4. Criminal Law (§ 829 (4)\*)—Instructions; Repetition.**—In a prosecution for attempt to rape, an instruction held not erroneous as failing to ignore the defense, which was not guilty; the instructions given at defendant's instance fully covering his theory.

[Ed. Note.—For other cases, see 7 Va.-W. Va. Enc. Dig. 726.]

**5. Criminal Law (§ 815 (4)\*)—Instructions; Ignoring Elements of Crime.**—In prosecution for attempt to rape, an instruction that.

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\*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

if the female was under 15, if defendant attempted by force to have intercourse with her, and, if he did any overt act toward carrying out that purpose, he would be guilty of attempted rape, held not objectionable as failing to recognize the essentials of an attempt to commit a crime, which are the intent and an ineffectual act towards its commission.

[Ed. Note.—For other cases, see 7 Va.-W. Va. Enc. Dig. 715.]

Error to Corporation Court of Roanoke.

M. Lufty was convicted of an attempt to commit rape, and he brings error. Affirmed.

*Hairston & Hairston*, of Roanoke, for plaintiff in error.

*Jno. R. Saunders*, Atty. Gen., *J. D. Hank, Jr.*, Asst. Atty. Gen., and *Morton L. Wallerstein*, of Richmond, for the Commonwealth.

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NICKELS' ADM'R *v.* HORSLEY et al.

Sept. 17, 1919.

[100 S. E. 831.]

**1. Executors and Administrators (§ 35 (19)\*)—Revocation of Appointment Not Reviewable unless Plainly Wrong.**—An appellate court will not review an order granting a motion under Code 1904, § 2687, for the revocation of the appointment of an administrator, except where manifest injustice has been done, or where it is plain that proper case has not been made for the exercise of the discretionary power of removal.

[Ed. Note.—For other cases, see 5 Va.-W. Va. Enc. Dig. 515, 516.]

**2. Executors and Administrators (§ 35 (2)\*)—Removal for Adverse Interest.**—Where a surviving partner, who was appointed administrator of his deceased copartner, failed to return any inventory within the time required by statute, and it appeared from his conduct that he was hostile and adversely interested to the distributees, his appointment was properly revoked.

[Ed. Note.—For other cases, see 5 Va.-W. Va. Enc. Dig. 515.]

**3. Partnership (§ 258 (2)\*)—Death of Partner; Administrator's Right of Action against Survivor.**—Unless there be exceptional circumstances, the administrator of a deceased partner is the only one entitled to sue to recover from surviving partners any balance due the estate of the deceased partner.

[Ed. Note.—For other cases, see 10 Va.-W. Va. Enc. Dig. 882.]

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